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In the Supreme Court of the United States

OCTOBER TERM, 1921

No. 195

CARLISLE PACKING COMPANY, *Petitioner,*

—VS.—

OLE SANDANGER, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The facts necessary for the determination of this case sufficiently appear, we think, in the opinion of the Supreme Court of the State of Washington in the case of *Sandanger vs. Carlisle Packing Company*, 112 Wash. 480, and we shall, therefore, make no statement of our own.

We may say, however, at this point that petitioner in its brief for some reason has seen fit to call attention to conflicts in the evidence and in a few instances to state the evidence adduced by it in the trial court, without stating either that this testimony was contradicted or the contradicting evidence. For instance, it is said on page 5 of petitioner's brief that the captain testified:

> "that the can had not been refilled on the day of the seventh or subsequent to the time he filled it on the 6th with kerosene."

Now, the witnesses for respondent testified that all the coal oil or kerosene which was originally in the can on March 6th had been used up on the 6th, and there was not enough to light the lantern that evening (Record p. 86), and that on the morning of the 7th some one brought this coal oil can to the boat and placed it on board (Record p. 192).

But we shall not labor this proposition further, as the court will take as an indubitable fact the testimony of witnesses for respondent even though such testimony was contradicted by the witnesses for the petitioner.

ARGUMENT

Was the Vessel Seaworthy at the Commencement of the Voyage and Thereafter?

The basis of petitioner's argument is, as it necessarily must be, that Sandanger's contract of employment on the day of the injury was a maritime one; that the vessel on which he was employed was seaworthy, and that, in consequence, he cannot recover anything but the expenses of his maintenance and cure.

We shall here enter into no discussion as to whether Sandanger's contract of employment was maritime in its nature, or not, but shall assume that it was maritime.

Conceding that the contract of Sandanger was a maritime one it cannot nevertheless be disputed that he can secure an indemnity for injuries received by him "in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship."

The Osceola, 189 U. S. 158, 175.

Pretermitting for the moment any discussion as to what constitutes seaworthiness of a vessel, we assert that the vessel must not only be seaworthy, but also must be so *at the commencement of the voyage*.

Sandanger was injured some time in the afternoon of March 7th. The vessel left on the contemplated voyage on the morning of that day. If the vessel was unseaworthy at the time she left on her contemplated voyage, then the judgment of the Supreme Court of the State of Washington must be affirmed.

In *The Lizzie Frank*, 31 Fed. 477, it is said:

> "On consulting the American authorities, we find it stated that the owner, among other obligation to the seaman, is bound to provide a seaworthy ship and that this means that at the *commencement* of a voyage the ship shall be furnished with all necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy."

See also:

2 Parsons Shipping and Admiralty, p. 78.

Dixon vs. Ship Cyrus, 2 Pet. Adm. 407, 411.

Rice vs. Kitty, 2 Pet. Adm. 420.

The Ship Moslem, Olcott's Adm., 289.

The Caledonia, 157 U. S. 124.

Moreover, the law of England, which this court said in *The Osceola*, 189 U. S. 158, was the same as our own in this regard, provides as follows:

> "§458 (1). In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, not-

withstanding any agreement to the contrary, an *obligation* on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing of the ship for sea, or the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage *commences*, and to keep her in a seaworthy condition for the voyage during the voyage."

57 and 58 Vict. c. 60, commonly known as the Merchant's Shipping Act, 1894, and acts amendatory thereof.

Now, in the case at bar, as we have said, the voyage commenced at seven o'clock in the morning of March 7, 1917. At that time there was on board the boat a can labeled "coal oil," and which should have contained coal oil but in fact contained gasoline. Owing to the fact that at this season of the year it rains every day at Cordova, the wood placed on board the boat for cooking was wet and it was kept wet not only by the continual downpour of rain but also by the splash of the waves (Record p. 83). It was necessary therefore to use coal oil to start a fire in the cheap sheet iron stove on the boat (Record p. 82). Manifestly the crew must eat; the food be cooked; a fire built to cook the food; and coal oil used to start the fire. A container holding coal oil would therefore be a proper and *necessary* appliance of the ship at the *commencement* of the voyage. It follows that the having on board at the *com-*

mencement of the voyage of a container purporting to contain coal oil but in fact containing gasoline, rendered the vessel unseaworthy at that time and thereafter.

Suppose for the voyage in question the only food provided was tinned meat; that this tinned meat contained some poisonous ingredients; that the crew ate this meat and were poisoned, would not the owner of the boat be liable for an indemnity for injuries consequent upon eating the poisoned meat? Now if the owner is liable in the hypothetical case, why should he not be liable when at the commencement of the voyage he furnishes either no means or a deadly, dangerous means of preparing food? Cases squarely in point, perhaps, may not be found, but there are several which are very similar to this case and others which lay down the principle for which we contend.

In *Woolf vs. Claggett*, 3 Esp. 257, it appears that on the voyage of a Danish ship from Altonia to Surinam, the master became incapacitated by a severe fit of the gravel, and the mate was rendered incapable of doing his duty by an infected hand and arm. A surgeon had been employed by the owners and was on board throughout the voyage. This surgeon, however, was apparently not provided with a syringe, an instrument necessary to relieve the master, or a lancet with which to treat the mate. The owner, in an action on the insurance policy, the defense to which was that the ship had deviated, claimed that the deviation was necessary. Lord Eldon said:

"It was in evidence, that a surgeon was necessary in such voyages as the one insured: if, therefore, sickness was to be set up as an excuse for deviation, the plaintiff should shew that the surgeon was provided with such medicines and instruments as would probably become necessary in the course of the voyage, arising from the common casualties of mankind. He thought, in the present case that had not been done: the surgeon at Plymouth was proved to have lanced the arm. Had the surgeon on board no lancet? The medicines too furnished by him, were of the most common kinds; and it was even proved, that though the captain was afflicted with the gravel, the ship's surgeon was unprovided with a syringe, though an instrument so necessary for that complaint."

Now, if in order to render a boat seaworthy it is necessary that a syringe be furnished to the ship's surgeon, in order that he may treat a person who becomes afflicted with the gravel on the voyage, *a fortiori*, it is necessary in order to render a vessel seaworthy at the commencement of the voyage that safe means of starting a fire for cooking be supplied. In this case, the testimony is that the use of coal oil was a common, habitual and safe method by which to start a fire. Coal oil, however, was not supplied, but gasoline, an agency as dangerous as trinitrotoluol for this purpose, was furnished.

In *Fontaine vs. The Phoenix Insurance Company of New York*, 10 Johnson 58, the owner of the brig Eliza sued on two policies of insurance cover-

ing a vessel which had been captured by a British frigate. The defense was that the vessel was unseaworthy at the commencement of the voyage in that sufficient candles, wood and oil had not been placed aboard her at the place of departure. The court said:

> "A ship, to be seaworthy when she sails, must, among other things, be provided with all necessary stores for the voyage. From the deposition of the mate, it appears very clearly that the brig Eliza was not duly provided with the essential articles of fire-wood and oil, or candles. The great distress arising from the want of these articles, evidently retarded the voyage in the Bay of Biscay. She could not carry full sail at night, from the difficulty of seeing the compass; and if the weather had been dark and tempestuous, she would have been exposed to the greatest danger. She likewise kept wearing and tacking, in order to meet some vessel to relieve her distress; and her object, for some days, was rather searching for relief, than making the best of her way directly, diligently, and with full sail, for her port of destination. She lingered and delayed her voyage, in the Bay of Biscay, without any cause, other than what was imputable to the negligence of the master or owners. No reason is given why those articles failed; nor is it shown that she was duly supplied when she left port. It is unreasonable and unjust that the underwriters should be exposed to losses arising from such gross negligence in fitting out the ship. It is very probable that if the vessel had been seaworthy, she might have escaped the

capture; and the verdict on this point, is too plainly against evidence to be supported."

In Halsbury's Laws of England, Vol. 26, page 211, it is said:

> "To render the ship seaworthy in the strict sense of the word, she must, at the time of her departure, be in a fit state, as to repairs, equipment and crew, and in all other respects, to encounter the ordinary perils likely to be encountered on the particular voyage at the particular season of the year. * * * There is equally a breach of the condition where, though she is, at the time of her sailing, apparently efficient, she suffers from some defect which will show itself in the course of the voyage, so that she cannot, in fact, be regarded as efficient. Thus, she may not be furnished with a supply of coals, or provisions, or medicines, sufficient to last the whole voyage."

In *The Edith Godden*, 23 Fed. 43, a seaman on the steamship Edith Godden was injured while engaged in hoisting and lowering away from the steamship a fruit boat. The fruit boat was lowered by means of a derrick and in the course of the operation the hook that held the derrick in place broke and the boom, in falling, struck the libelant upon the shoulder. "An examination of the hook showed no defects in the iron at the place of breakage, and no apparent insufficiency." Judge Brown said:

> "There is no question that in modern maritime law the owners are responsible for due

care and diligence in the proper equipment of the vessel for the contingencies of the voyage. *Halverson vs. Nisen*, 3 Sawy. 562. See *The Explorer*, 20 Fed. 135. In the use of modern appliances, such as a steam-winch in connection with a derrick, as in this case, not for the prosecution of her ordinary navigation, but for the conveniences of the ship in loading or unloading, it is more *reasonable* and *equitable* to apply the analogies of the municipal law in regard to the obligation of owners and masters, rather than to extend the limited rule of responsibility under the ancient maritime law to these new modern conditions, for which those limitations were never designed. And, in applying the analogies of the municipal law, the *helplessness of seamen*, and the *imperative duty of obedience*, as I have above said, ought to impose upon masters and owners the highest rule of diligence and care in ascertaining the sufficiency of all such modern appliances for the exigencies to which they are to be subjected."

In *Olsen vs. Flavel*, 34 Fed. 477, a mate was injured while wheeling coal from the dock to the ship. The method employed by him was to place the coal in a wheel-barrow and wheel the same along a plank 18 inches wide from the dock to the ship. There was an iron chute on the dock by means of which the coal could have been sent down into the hold of the boat. Judge Deady found that the mate was negligent because he did not use the chute or in not constructing a safer gangway. He nevertheless held that the owner was liable for the injuries

to the mate, and this court, in the case of *The Osceola*, 189 U. S. 158, 174, states that the basis of the opinion of Judge Deady was that the owner had failed to provide a proper appliance and in consequence the case was one of *unseaworthiness.*

In the case of *The A. Heaton*, 43 Fed. 592, a seaman who was injured by reason of the fact that a portion of the rigging had become worn and weak by long use was permitted to recover an indemnity for his injuries. Judge Gray in writing the opinion stated that there was "no evidence that the owners sent the vessel to sea in an unseaworthy condition or were themselves negligent either in the selection of a master or otherwise." This court nevertheless held in *The Osceola*, 189 U. S. 174, that the case was one of unseaworthiness.

The Drummelton, 158 Fed. 454.

The Argo, 210 Fed. 872.

The Badger, 218 Fed. 81.

Olsen vs. Flavel, 34 Fed. 477.

The Julia Fowler, 49 Fed. 277.

The Frank & Willie, 45 Fed. 494.

Tavares vs. Dewing, 33 R. I. 434; 82 Atl. 137.

The cases cited by petitioner on pages 27 and 28 of its brief are not in point. Preliminarily, it

may be said that all of them were decided in the Second Circuit and the members of the Circuit Court of Appeals for the Second Circuit apparently have some doubt as to the correctness of the decision in the case of The Osceola. For in *The New York*, 204 Fed. 764, they say of that decision that "It is inconsistent with many prior and some subsequent decisions."

Again the rule announced in *The New York*, 204 Fed. 764, and *The Santa Clara*, 206 Fed. 178, is directly contrary to the rule announced by the Circuit Court of Appeals for the Ninth Circuit, in *The Argo*, 210 Fed. 872.

However all this may be, the real ground of decision in *The New York* and *The Santa Clara* was that the vessel was built and equipped in the *usual* way, but certainly it is not *usual* for ship owners to furnish gasoline to start a fire.

In *Hanrahan v. Pacific Transport Co.*, 262 Fed. 951, the libelant claimed that he was injured by reason of the negligence of the officers of the ship in failing to place a certain hand rail in place. There was no evidence, however, but that a hand rail was on board the boat and that it was sufficient for the purpose for which it was to be used. In order that the work of the ship could go on, this hand rail or gate would have to be removed from its place from time to time, and we are inclined to agree with the statement of Judge Hough, when he says that

"to say that this ship was unseaworthy because she had no handrail up, while lying alongside a wharf, discharging cargo, is merely untrue."

In that case, however, the owner furnished at the commencement of the voyage a seaworthy ship and proper appliances. The libellant in that case was injured by reason of the failure of the crew properly to use the appliances. In the case at bar a proper appliance was not furnished.

In *The Santa Barbara*, 263 Fed. 369, the libelant was ordered to "shin up" a guy, which aided in staying a smoke stack of the steamer, and reeve a rope through a pully block at the upper end thereof in order that there might be raised and lowered at will a boatswain's chair in which men might sit for cleaning and painting the stack. There was no contention in that case but that proper appliances had been furnished. The libelant climbed the guy and remained there for some ten or fifteen minutes; feeling tired he started to descend, lost his grip on the guy and fell to the deck. It is apparent that the injury in that case was due solely to libelant's overtaxing his strength, and no question of seaworthiness was therein involved.

Now no one will dispute that fuel is a part of the equipment of a vessel, but the only fuel provided on this vessel was thin, wet box wood which

would not burn except with the assistance of some other agency. (Record 97.)

The *usual* and *customary* agency in Alaska was coal oil.

The owner of this particular vessel recognizing this custom did provide a container for the coal oil and labeled the container in that way. The container, however, was not a proper appliance unless its content was coal oil. The jury found upon evidence which the Supreme Court of the State of Washington deemed proper, legal and sufficient, that the can contained *not* coal oil but gasoline.

It is urged here, however, that the cause of Sandanger's injury was that the master of the vessel negligently filled the coal oil can with gasoline. There is grave doubt if the master was negligent. He procured this oil from a drum placed in the petitioner's oil house located on land. In this oil house were two drums placed side by side and which in outward appearance were exact duplicates. They were of the same size and color. They contained no markings showing what their contents were. (Record, pp. 44, 45, 49, 53, 57, 63, 98, 105, 107.)

True, petitioner sought to show in the trial court that gasoline was *not* kept in the oil house; that gasoline *was* kept in the oil house but in five-gallon cans; that the drums containing coal oil and gasoline were marked so as to indicate their con-

tents; that it was against the law to keep gasoline in a drum unless the drum was so marked. The jury, however, did not believe this testimony.

It would seem that the master was not really at fault if the drums were the same size and color and contained no indication of what their contents were.

But even assuming for the sake of the argument that the master was negligent, yet nevertheless his negligence was antecedent to the commencement of the voyage on March 7th. It is the owner's duty, however, to furnish a seaworthy boat at the commencement of the voyage and if he fails to do so he is liable.

In *The Drumelton*, 158 Fed. 454, it is said:

> "It is, however, ingeniously argued, that because the defectively fastened cleat was in and of itself a good cleat, fastened with good spikes and put in place by the officers of the ship themselves, the fastening of this good cleat with good spikes to a weak piece of wood was negligence, and no more. This proves too much, for it would necessarily follow that an owner might hand his vessel over to the master and officers incomplete in numerous minor, but vital details, leaving it to them to finish the ship, and then claim, if defects appeared, that the vessel was not unseaworthy, because the defective workmanship resulting from the labors of the master and officers was no more than negligence in the operation or management of the vessel. This cannot be."

Petitioner Cannot Avail Itself of the Benefit of Sections 4283, 4289, Revised Statutes

Another contention is attempted to be founded on Sections 4283, 4289, Revised Statutes. It can be shortly answered. No pleading of any kind setting up this defense was ever filed. No mention of this defense was made in the answer. During the course of the trial the President of the Carlisle Packing Company testified, over objection that it was immaterial and irrelevant, that if the vessel on which Sandanger was injured was 28 feet long, she was worth *about* $1500 (Record p. 338). This alleged defense was *not* made a ground for a directed verdict (Record p. 361), but it is true that an instruction in conformity with this contention was requested (Record p. 18). No mention, however, of this defense was made in the motion for judgment non obstante nor in the motion for a new trial, nor was this particular matter presented to the Supreme Court of the State of Washington.

This court will observe that the Supreme Court of the State of Washington does not mention this contention and it will not be asserted in this court that any argument was made thereon to the Supreme Court of the State of Washington. The petition for writ of certiorari to this court and the brief accompanying it are void of any reference to Sections 4283 and 4289, Revised Statutes, or the value of the boat. The insistence in both petition and brief is that respondent was entitled to recover

the sum of $175.00 and no more. The basis for that contention was that "there was no evidence in the Record tending to show any unseaworthiness" (Petition p. 12), but that nevertheless the Supreme Court of the State of Washington had held that the vessel was unseaworthy. This particular defense, of course, admits that the boat was unseaworthy, but that liability should be limited.

Again it is insisted in both petition for writ of certiorari and the brief accompanying the same, that the petition should be granted because the question involved was one of great importance. Now, if there was an important question involved in this case, what was it? The answer clearly is that the Supreme Court of the State of Washington had erred in holding that the vessel was unseaworthy, not in failing to limit the liability of the owners for furnishing an unseaworthy boat. Parenthetically, it may be said that since the passage of the Act of Congress of June 5, 1920, commonly known as the Merchant Marine Act (41 St. at L., p. 1007), any question involved in this case has ceased to be important.

In any event, it would seem plain that if any such question was ever involved in this case, it had been waived by failure to present same to the Supreme Court of the State of Washington.

Despite all the foregoing, it is nevertheless clear that this defense is not available here to the petitioner. We may agree that a ship owner may

limit his liability even when only one claim is involved; that a motor boat comes within the meaning of the word "vessel" as used in the Limitation of Liability Act; that that Act applies to cases of personal injuries and death of seamen; and that advantage of the Act may be taken in the action brought in the State court. But we assert that if advantage of the Act is desired, the question must be raised by answer.

In *The Maria and Elizabeth*, 11 Fed. 520, it is said:

> "Where the owners may invoke the provisions of the section, the court cannot know, *without appropriate proceedings* the value of the offending vessel and the pending freight. If the owners desire to claim the benefit of the limitation of liability, the duty is upon them to *take affirmative steps* to secure it. It was perhaps doubtful what these steps should be, or how they should be taken, until the promulgation of rules 54, 55, 56 and 57, in admiralty, growing out of the case of *Norwich Co. v. Weight*, 13 Wall. 125. Since then there has been no doubt."

In *The Rosa*, 53 Fed. 132, Judge Brown said:

> "The limitation of responsibility provided by law can be as fully and as readily secured in a common-law suit, as in this court, where there is but a single claim against the vessel, or her owners. All that is needed in either court is an *answer* setting up the limitation of liability

under Section 4283 of the United States Revised Statutes, with a statement of the value of the owners' interest in the vessel and her freight pending." (Italics are the court's.)

See also:

The Great Western, 118 U. S. 520, 525;

The Scotland, 105 U. S. 24, 33.

This defense, then, may be availed of by the owner only by *appropriate proceedings*. If the owner does not desire to file a petition for limitation of liability, but desires to raise this question in the suit brought against him or his vessel, he may do so by filing an answer or pleading, but the method here adopted was not an appropriate proceeding. The respondent was never advised that any such question would be raised. He was wholly unprepared to show the value of the vessel or her pending freight.

We submit that the judgment of the Supreme Court of the State of Washington should be affirmed.

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